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No. 04-70

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

EUGENE E. STEARNS*
STEARNS WEAVER MILLER
WEISSLER ALHADEFF
& SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, FL 33130
(305) 789-3200

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY
& ALLEN, P.A.
150 West Flagler Street
Suite 2000, Museum Tower
Miami, FL 33130
(305) 371-2223

Attorneys for Respondents

* *Counsel of Record*

189559

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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THE CIRCUMSTANCES REQUIRING SUPPLEMENTAL BRIEFING

Following the filing of Exxon's Petition and Respondents' Brief in Opposition, three decisions were published which have application to this case: *Shell Oil Co. v. HRN, Inc.*, 2004 WL 1908315 (Tex. Aug. 27, 2004); *Klay v. Humana, Inc.*, 2004 WL 1938845 (11th Cir. Sep. 1, 2004) (Tjoflat, J.)[1]; and *Olden v. Lafarge Corp.*, 2004 WL 1960157 (6th Cir. Sep. 7, 2004).

In *Shell Oil*, the Texas Supreme Court expressly approved the district court's analysis of Texas law in the present case as it pertains to U.C.C. § 2-305, rejecting Exxon's suggestion that Texas law regarding § 2-305 required a different result.

In *Klay*, the Eleventh Circuit discussed its opinion on class certification in this case and provided additional insight into why Exxon was unable to muster support for its Rule 23 argument from even a single member of that oft-divided court.

In *Olden*, the Sixth Circuit became the ninth circuit court to decide whether Congressional enaction of 28 U.S.C. § 1367 overruled the holding of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *Olden* joined the Fifth, Seventh, Fourth, Ninth, and Eleventh Circuits in the view that a plain reading of the unambiguous language of § 1367 compels the conclusion that *Zahn* has been overruled.

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1. Judge Tjoflat, of course, authored the opinion dissenting from the denial of rehearing en banc on the issue of supplemental jurisdiction in the present case.

Exxon asserted in its Petition – for the first time – that state law application of U.C.C. § 2-305 is not uniform.[2] In an attempt to illustrate its point with respect to this new issue, Exxon argued that *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002), had incorrectly applied Texas law with respect to U.C.C. § 2-305, and was contrary to decisions of other state courts interpreting § 2-305 (citing cases applying the law of states not part of this class action).

Exxon also asserted that the Fifth Circuit's interpretation of Texas law in *Mathis* was being reviewed by the Texas Supreme Court in *Shell Oil*, and intimated that the issue would likely be decided differently in that case (in which Exxon had filed an amicus brief). (Pet. at 27 n.10). Respondents, in turn, pointed out that regardless of the outcome of *Shell Oil*, none of the factors allowing sellers to enjoy the good faith safe harbor under U.C.C. § 2-305 were present in this case, as there was no possible interpretation of its statutory obligation of good faith that Exxon did not breach. (Opp. at 17-18).

Plaintiffs have been proven right. In *Shell Oil*, decided a few days ago, the Texas Supreme Court expressly concluded that the district court's application of Texas law with respect to U.C.C. § 2-305 was entirely *correct*:

> In *Allapattah*, another case involving a refiner and its dealer network, the dispute concerned the

2. Exxon argues that it did raise the issue below, citing its initial brief to the Eleventh Circuit, pp. 32-35. (Rep. at 9 n.3). However, the argument in those pages does not identify any differences in the manner in which states interpret or apply U.C.C. § 2-305. Nor did Exxon advance such an argument elsewhere in its appeal to the Eleventh Circuit or at any point in the proceedings before the district court.

calculation of a discount that was to be applied to the refiner's posted price. *Allapattah*, 61 F. Supp. at 1312-13. The refiner implemented a discount for cash program to offset the costs of credit card processing which the dealers alleged resulted in their being charged twice for the cost of credit. The court concluded that these allegations were not the normal case contemplated under section 2-305 if there was evidence that the refiner double charged to recover its costs of credit while representing to its buyers that its price was net of credit costs. *Id.* at 1322. The posted-price presumption did not apply, according to the court, because the dispute was not about price but rather the "manner in which the wholesale price was calculated without considering the double charge for credit card processing." *Id.*

> Both of these cases[3] recognize that a price, commercially reasonable on its face, may nevertheless be applied in a dishonest fashion. But in both of these cases, the allegation of bad faith resulted in a commercial injury distinct from the price increase itself.

Shell Oil, 2004 WL 1908315, at *5.

Notwithstanding the specific recognition and endorsement of the district court's decision by Texas' highest court, Exxon argues in its Reply Brief that *Shell Oil* supports its Petition. To say the least, it does not.

3. *Shell Oil* also favorably reconciled a Ninth Circuit decision, *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981) which concluded that a "posted price" did not satisfy the "normal case" presumption of U.C.C. § 2-305.

The observation in *Shell Oil* that "the allegation of bad faith [in *Allapattah*] resulted in a commercial injury distinct from the price increase itself" is well supported by the record. To induce its dealers to alter the way they priced at retail, Exxon promised its dealers that it would reduce wholesale prices to offset newly imposed credit charges. Exxon's senior officers admitted that this promise was uniformly communicated to the dealers and their representatives and amounted to an enforceable obligation under the U.C.C. At the same time Exxon was assuring its dealers that the offset was being provided, Exxon internally documented its intent to do the opposite and its success in doing so, thereby carrying out its long term objective of reducing the incomes of its "keeper" and "non-keeper" dealers alike. Finally, the test of performance of its obligation described by Exxon in its answers to interrogatories – a statistical analysis "on average, over time, and across markets" – proved Exxon's breach.

But for the fact that *Shell Oil* found for an oil company on a claim brought by dealers, there is no other relationship between the facts of *Shell Oil* and this case.[4] The bedrock of the decision in favor of Shell was that Shell's dealers stipulated that Shell "charged a posted price applied *uniformly* to all dealers," which was "within the range charged by other refiners to their dealers." *Shell Oil*, 2004 WL 1908315, at *2, 5 (emphasis added). The Texas court relied on both of those critical facts in concluding Shell was entitled to a "normal case" presumption of good faith under U.C.C. § 2-305.

4. For example, contrary to Exxon's brief (Rep. at 9), *Shell Oil* did not arise under a discount for cash program. Shell was the only major oil company that never implemented such a program.

By contrast, Exxon set prices which varied from dealer to dealer, region to region, and state to state.[5] Moreover, Exxon failed to demonstrate at trial that its wholesale prices were "within the range of" its competitors' prices.[6]

It therefore comes as no surprise that the Texas Supreme Court agreed with the district court's application of U.C.C. § 2-305 in this case.

KLAY v. HUMANA, INC.

In *Klay*, the Eleventh Circuit described in considerable detail the circumstances warranting or precluding class certification of breach of contract actions involving the laws of more than one state. In particular, the Eleventh Circuit recognized that "if a claim is based on a principle of law that is *uniform* among the states, class certification is a realistic possibility." 2004 WL 1938845, at *15 (emphasis added).

5. It was the myriad of Exxon's wholesale prices that led it to argue below that compliance with its obligation to reduce its prices by an amount sufficient to offset credit card fees was accomplished – and its performance should be tested – by an "on average, over time and across markets" analysis; an analysis Exxon unsuccessfully attempted to abandon when the statistical evidence applying Exxon's test proved its breach. Doc. 1532 Tr. 1187-92; Doc 1536 Tr. 2114-57; P. Ex. 39, 40.

6. Exxon offered dozens of trial exhibits purportedly reflecting that its prices were equal to or lower than its competitors' wholesale prices. These charts self destructed when Exxon's senior officers admitted that Exxon did not know its competitors' actual wholesale prices which are closely guarded corporate secrets, subject to a variety of hidden rebates, allowances, rent adjustments and discounts. Doc. 1532 Tr. 1187-96; Doc. 1536 Tr. 2114-65; Doc. 1541, Tr. 3823-25. Obviously, Exxon's comparison of its own prices to prices it did not know proved nothing.

In that case, the court determined that, because the numerous contracts sued upon contained many material differences, as did the various applicable state laws, class certification was not appropriate. *Id.* at *15-20. In doing so, however, the court specifically distinguished the present case, where certification was appropriate:

> This case stands in sharp contrast to *Allapattah*, 333 F.3d 1248, in which we affirmed certification of a class of approximately 10,000 Exxon dealers who sued Exxon Corp. for breaching their dealer agreements by overcharging them for wholesale fuel purchases. The dealers alleged that Exxon had promised them that it would reduce the price of gasoline by 1.7 cents per gallon, but secretly eliminated that price reduction after a few months. Exxon challenged the district court's certification of a class of all Exxon retailers, alleging "that there were individual issues inherent in each dealer's breach of contract claim and [Exxon Corp's] own affirmative defenses." *Id.* at 1261. We rejected this argument, holding: "Because all of the dealer agreements were materially similar and Exxon purported to reduce the price of wholesale gas for all dealers, the duty of good faith was an obligation that it owed to the dealers as a whole. Whether it breached that obligation was a question common to the class, and the issue of liability was appropriately determined on a class-wide basis." *Id.*

In *Allapattah*, Exxon cheated all of the plaintiffs in exactly the same way – by secretly eliminating its 1.7 cents per gallon price reduction. Once the plaintiffs proved that Exxon engaged in this behavior, each individual plaintiff's breach of contract claim was substantially advanced. In light of this classwide evidence, each individual dealer

> could demonstrate that Exxon violated his contractual rights simply by demonstrating that he had purchased gas from Exxon during the relevant time period. . . .

Id. at *20 (alteration in original).

OLDEN v. LAFARGE CORP.

In their opposition brief, Plaintiffs predicted that interlocutory review of class certification decisions would provide this Court with far better vehicles than *Allapattah* to resolve the circuit split on the issue of supplemental jurisdiction. In *Olden*, the Sixth Circuit has demonstrated that point.

The *Olden* decision by itself is unremarkable, having concluded as have five other circuit courts, that the plain language of 28 U.S.C. § 1367 dictates the outcome of this issue. Unlike *Allapattah*, however, *Olden* has not been pending for over thirteen years in litigation, the case is not otherwise concluded, most of the aggregate claim appears to be on behalf of claimants with claims below the amount for original diversity jurisdiction, the defendant's liability has not yet been yet determined for the smaller claimants regardless of the outcome of the jurisdictional issue[7] and the corporate defendant seeking to avoid federal jurisdiction has not purchased full page ads

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7. In its Reply brief, Exxon argued that it could still find many ways to frustrate its obligation to the smaller claimants (Rep. at 4), bringing to the fore Judge Tjoflat's discussion in *Klay*, that one of the reasons class treatment of a dispute may be a superior means of adjudication arises "when the defendants are corporate behemoths with a demonstrated willingness and proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings," 2004 WL 1938845, at *23. This, of course, sheds a different light on Exxon's argument that it should be applauded for having the resources to take this case to the absolute limit. (Pet. at 4).

in the New York Times advocating the opposite position, urging federal jurisdiction over all class actions.

If the Court wishes to resolve the now six to three split among the circuits, *Olden* demonstrates that there are more appropriate opportunities to do so.

CONCLUSION

These three recent decisions further defeat Exxon's attempt to castigate the Eleventh Circuit as a court run amok, improperly authorizing the distortion of state law to facilitate class certification. Hardly an avatar of plaintiff-friendly jurisprudence, the Eleventh Circuit has a demonstrated history of thoughtful opinions on the subject of class certification. The most recent, *Klay*, also evidences the wisdom in this Court's historical deference to lower courts in addressing issues of state law. In this case, both the circuit court and the district court have conscientiously performed that duty.

Respectfully submitted,

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY
& ALLEN, P.A.
150 West Flagler Street
Suite 2000, Museum Tower
Miami, FL 33130
(305) 371-2223

EUGENE E. STEARNS*
STEARNS WEAVER MILLER
WEISSLER ALHADEFF
& SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, FL 33130
(305) 789-3200

Attorneys for Respondents

* *Counsel of Record*